UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LENNY ROSS, Petitioner, v. PATRICK NOGAN, et al., Respondents.	:	Civ. No. 19-6595 (NLH) OPINION

Appearances

Lenny Ross
873781
East Jersey State Prison
Lock Bag R
Rahway, NJ 07065

Petitioner pro se

John J. Santoliquido, Esq.
Office of the Prosecutor
4997 Unami Blvd.
P.O. Box 2002
Mays Landing, NJ 08330

Counsel for Respondents

HILLMAN, District Judge

I. INTRODUCTION

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the following reasons, Petitioner's habeas petition will be denied and a certificate of appealability will not issue.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner shot and killed Steven Gurss on December 24, 2011, during a drug transaction when Gurss did not pay for the drugs Petitioner supplied him. See ECF No. 5-4 at 7. At the time of the shooting, Shawn Rice, a neighbor of Petitioner's, stated he heard gun shots and a car crash. See ECF No. 5-3 at 14. Rice then looked out the window and recognized Petitioner. See id. at 14-15. Investigators later showed Rice Petitioner's photograph and he positively identified Petitioner as the person he saw. See id. at 19. Another witness, Krystal Stanford, also positively identified that Petitioner was at the crime scene. See id. at 26-27. Like Rice, Stanford also identified Petitioner from a photograph of him shown to her. See id. at 29-30.

On November 27, 2012, Petitioner was indicted on multiple counts by an Atlantic County, New Jersey grand jury. See ECF No. 5-2. More specifically, the grand jury charged Petitioner as follows:

1. Three counts of possession of heroin in violation of N.J. Stat. Ann. § 2C:35-10a(1) (Counts 1, 9 and 11)

2. Two counts of possession of heroin with intent to distribute in violation of N.J. Stat. Ann. § 2C:35-5a(a) (Counts 2 and 12)

3. One count of possession of a firearm while possessing heroin with intent to distribute in violation of N.J. Stat. Ann. § 2C:39-4.1 (Count 3)

4. One count of murder in violation of N.J. Stat. Ann. § 2C:11-3a(1)(2) (Count 4)

5. One count of possession of a firearm for an unlawful purpose in violation of N.J. Stat. Ann. § 2C:39-4a (Count 5)

6. One count of unlawful possession of a handgun in violation of N.J. Stat. Ann. § 2C:39-5b (Count 6)

7. One count of distribution of heroin in violation of N.J. Stat. Ann. §§ 2C:35-5a(1) & 2C:35-5b(3) (Count 10)

8. One count of possession of a handgun by a convicted person in violation of N.J. Stat. Ann. § 2C:39-7 (Count 13)[1]

Petitioner unsuccessfully moved to suppress Rice and Stanford's identifications. See ECF No. 5-3 at 129. Subsequently, the matter was prepared for trial to begin in January 2014. After jury selection though, Petitioner pled guilty to one amended count of aggravated manslaughter. The other counts were dismissed. See ECF No. 5-4 at 2. During the plea hearing, Petitioner admitted he shot Gurss one time after Gurss tried to "rip [him] off" for the drugs. See id. at 7.

Petitioner next moved to withdraw his guilty plea before sentencing. In support of his motion to withdraw his plea, Petitioner noted "the questionable nature of his identification by supposed eyewitnesses and the fact that the alleged weapon used was found several months after the incident, evidently,

[1] Co-defendant Teonka Williams was charged in Counts 7 and 8 and co-defendant Nicolas Chickadel was charged along with Petitioner in Count 9.

with no prints or no DNA on it[,]" and that the prosecutor withheld photographs from discovery. See ECF 5-5 at 3. Petitioner also argued that the State provided new evidence on the eve of trial such that he only had five or ten minutes to decide on whether to plead guilty after receipt of this evidence. See id. at 3-4.

The New Jersey Superior Court denied Petitioner's motion to withdraw his guilty plea finding that Petitioner knowingly and voluntarily entered his plea and nothing in his motion to withdraw gave him the right to do so. See id. at 8. Petitioner then received a sentence of thirty years imprisonment. See id. at 17.

Petitioner appealed to the New Jersey Superior Court, Appellate Division arguing he received an excessive sentence. See ECF No. 5-6 at 4-5. Petitioner's appeal was placed on the Appellate Division's Excessive Sentencing Oral Argument ("ESOA") calendar which only allows a party to raise claims related to the excessiveness of a sentence pursuant to N.J. Ct. R. 2:9-11.[2]

[2] That rule states as follows:

> In a criminal, quasi-criminal or juvenile action in the Appellate Division in which the only issue on appeal is whether the court imposed a proper sentence, briefs shall not be filed without leave of court and the matter shall be placed on a sentencing calendar for consideration by the court following oral argument, which shall

Petitioner then filed a pro se appellate motion that the Superior Court should have allowed him to withdraw his guilty plea and requested that his appeal be placed on the Appellate Division's plenary calendar. See ECF No. 5-18 at 90-95. Petitioner's appellate counsel also made this argument on Petitioner's behalf during oral argument before the ESOA Appellate Division calendar. See ECF No. 5-6 at 5.

The appeal though was not reassigned to the plenary calendar. Instead, on October 1, 2014, the same day as the Appellate Division heard oral argument on Petitioner's appeal on its ESOA calendar, the Appellate Division issued a one-page order holding that the only issue on appeal related to Petitioner's sentence and that the sentence was not manifestly excessive or unduly punitive. See ECF No. 5-10.

Petitioner then filed a petition for certification to the New Jersey Supreme Court. See ECF Nos. 5-11 & 5-12. Among the claims Petitioner raised to the New Jersey Supreme Court were that: (1) the Appellate Division denied his right to direct appeal because the matter was placed on the Appellate Division's

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> be recorded verbatim. The appellate court at its discretion may direct the removal of any case from the sentencing calendar.

N.J. Ct. R. 2:9-11. The ESOA was an outgrowth of a pilot program. The New Jersey Supreme Court has found it does not violate a defendant's due process rights. See State v. Bianco, 511 A.2d 600, 608 (N.J. 1986).

ESOA rather than its plenary calendar; and (2) the Superior Court improperly denied his constitutional right to a trial when it denied his motion to withdraw his guilty plea. See ECF No. 5-12. On October 22, 2015, the New Jersey Supreme Court denied certification without discussion. See ECF No. 5-14.

Thereafter, Petitioner filed a post-conviction relief ("PCR") petition in the Superior Court. See ECF Nos. 5-15, 5-16, 5-18. Petitioner raised several ineffective assistance of counsel claims in his PCR petition. The Superior Court held oral argument on Petitioner's PCR petition on April 6, 2017. See ECF 15-7. On May 2, 2017, the Superior Court denied Petitioner's PCR petition in a written opinion and order. See ECF Nos. 5-19 & 5-20. The Appellate Division affirmed the denial of Petitioner's PCR petition on appeal. See ECF 5-24. The New Jersey Supreme Court denied Petitioner's petition for certification on his PCR petition without discussion. See ECF No. 5-25.

Petitioner then filed his federal habeas petition in this Court. See ECF No. 1. Petitioner raises seven claims in his habeas petition, they are as follows:

1. Petitioner was denied the right to a direct appeal when the Appellate Division failed to consider his claim that the Superior Court erred in denying his motion to withdraw his guilty plea ("Claim I").

2. Petitioner was denied his right to a trial when the Superior Court denied his motion to withdraw his guilty plea ("Claim II").

3. Trial counsel was ineffective due to his lack of diligence in failing to follow Petitioner's request for discovery, suppression motions, an interlocutory appeal on the denial of his suppression motions, getting a 10-15 sentence and filing a motion to withdraw his guilty plea ("Claim III").

4. Trial counsel was ineffective by failing to investigate and present a trial strategy by not challenging the credibility of Rice and Stanford's identifications ("Claim IV").

5. Trial counsel was ineffective by failing to present a viable defense and exculpatory evidence by not obtaining an affidavit from Rice nor Petitioner to support Petitioner's actual innocence argument on his motion to withdraw his guilty plea ("Claim V").

6. Counsel was ineffective on appeal for failing to raise an argument that the Superior Court erred in denying his motion to withdraw his guilty plea ("Claim VI").

7. PCR counsel was ineffective in failing to investigate and interview witnesses Rice and Aaron Chandler ("Claim VII").

Respondents filed a response in opposition to Petitioner's habeas petition. See ECF Nos. 5 & 6. Petitioner did not file a reply brief.

III. LEGAL STANDARD

An application for writ of habeas corpus by a person in custody under judgment of a state court can only be granted for violations of the Constitution or laws or treaties of the United States. See Engle v. Isaac, 456 U.S. 107, 119 (1982); see also, Mason v. Myers, 208 F.3d 414, 415 n.1 (3d Cir. 2000) (citing 28 U.S.C. § 2254). Petitioner filed this petition for writ of

habeas corpus after April 24, 1996, thus, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996), applies. See Lindh v. Murphy, 521 U.S. 320, 326 (1997). Under AEDPA, federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. See 28 U.S.C. § 2254(d).

As a threshold matter, a court must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Lockyer v. Andrade, 538 U.S. 63, 71 (2003) (quoting 28 U.S.C. § 2254(d)(1)). "'[C]learly established federal law' under § 2254(d)(1) is the governing legal principle set forth by the Supreme Court at the time the state court renders its decision." Id. (citations omitted). A federal habeas court making an unreasonable application inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." See Williams v. Taylor, 529 U.S. 362, 409 (2000). Thus, "a federal court may not issue a writ simply

because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. Furthermore, a federal court must accord a presumption of correctness to a state court's factual findings, which a petitioner can rebut only by clear and convincing evidence. See 28 U.S.C. § 2254(e); see also Rice v. Collins, 546 U.S. 333, 339 (2006) (petitioner bears the burden of rebutting presumption by clear and convincing evidence); Duncan v. Morton, 256 F.3d 189, 196 (3d Cir. 2001) (factual determinations of state trial and appellate courts are presumed to be correct).

The AEDPA standard under § 2254(d) is a "difficult" test to meet and is a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011). A petitioner carries the burden of proof and with respect to review under § 2254(d)(1), that review "is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen, 563 U.S. at 181.

In applying AEDPA's standards, the relevant state court decision that is appropriate for federal habeas corpus review is the last reasoned state court decision. See Bond v. Beard, 539 F.3d 256, 289-90 (3d Cir. 2008). Furthermore, "[w]here there

has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991); see also Dennis Sec'y Dep't of Corr., 834 F.3d 263, 353 n.10 (3d Cir. 2016) (Jordan, J., concurring in part and concurring in the judgment) (noting that while Ylst predates the passage of AEDPA, the Ylst presumption that any subsequent unexplained orders upholding the judgment will be presumed to rest upon the same ground is still valid).

Additionally, AEDPA deference is not excused when state courts issue summary rulings on claims as "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Harrington v. Richter, 562 U.S. 86, 99 (2011) (citing Harris v. Reed, 489 U.S. 255, 265 (1989)).

Where a Petitioner has failed to exhaust a claim in the state courts, a federal habeas court can still deny that claim on the merits provided it is not "colorable." See Carpenter v. Vaughn, 296 F.3d 138, 146 (3d Cir. 2002) (quoting Lambert v. Blackwell, 134 F.3d 506, 514–15 (3d Cir. 1997) (construing 28 U.S.C. § 2254(b)(2))); see also 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the

merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

IV. DISCUSSION

A. Claims I & II

Petitioner asserts in Claim I that his right to directly appeal the Superior Court's denial of his motion to withdraw his guilty plea was unconstitutionally denied because his appeal was assigned and remained with the ESOA Appellate Division panel. In Claim II, Petitioner makes the more direct claim that the Superior Court's denial of his motion to withdraw his guilty plea was unconstitutional.

Petitioner takes exception to the legitimacy of the ESOA calendar as it prevented him from raising claims outside of the sentencing context, most notably issues related to the denial of his motion to withdraw his guilty plea. Respondents attached Petitioner's notice of appeal as well as his pro se request to have his appeal moved from the ESOA calendar to the Appellate Division's plenary calendar. See ECF Nos. 8 & 5-18 at 90-95. Petitioner expressly stated he wished to appeal the denial of his motion to withdraw his guilty plea by the Superior Court on direct appeal. See ECF No. 5-18 at 94-95; ECF No. 5-6 at 4-5.

The Appellate Division affirmed Petitioner's sentence in a one-page order the same day it held oral argument. The entirety of that order stated as follows:

> Having considered the record and argument of counsel, and it appearing that the issues on appeal relate solely to the sentence imposed, we are satisfied that the disposition is not manifestly excessive or unduly punitive and does not constitute an abuse of discretion. State v. Bieniek, 200 N.J. 601 (2010); State v. Natale, 184 N.J. 458 (2005); State v. O'Donnell, 117 210 (1989); State v. Ghertler, 114 N.J. 383 (1989); State v. Roth, 95 N.J. 334 (1984).
>
> The judgment of the trial court is affirmed.

ECF No. 5-10. Thus, the Appellate Division did not expressly rule on Petitioner's claim that the Superior Court erred in denying his motion to withdraw his guilty plea given that it stated Petitioner's only claim related to his sentence.

Petitioner though argued to the New Jersey Supreme Court that the Appellate Division erred by not converting his appeal to the plenary calendar so it could also consider his separate argument that his motion to withdraw his guilty plea was improperly denied. See ECF No. 5-12. The New Jersey Supreme Court summarily denied Petitioner's petition for certification without discussion. See ECF No. 5-14.

For purposes of this opinion, this Court will analyze Claim II, before analyzing Claim I. Based on the foregoing procedural history, the last reasoned decision as it relates to Claim II – whether the Superior Court erred in denying Petitioner's motion to withdraw his guilty plea - is from the Superior Court. That Court ruled on Petitioner's motion from the bench as follows:

[B]oth parties briefed this matter under Slater. And under Slater, before the sentence the – Slater, is 198 N.J. 145, dealing with the issue of withdrawing a guilty plea. It should be noted that the defendant entered a guilty plea after a jury was selected, and it was right before openings were to take place, the day after jury selection, where he pled to an aggravated manslaughter charge for a penalty with a cap of 30 years State Prison.

Under Slater there's four factors that the Court has to consider. First, whether defendant has in fact, asserted a colorable claim of innocence. Two, whether or not the strength of defendant's reasons for withdrawal consider the strength of those reasons. Three, whether in fact, there was a plea bargain, which there was in this case. And some facts to consider is that defendants would normally have a heavier burden in seeking to withdraw pleas entered as a part of a plea bargain.

Fourth, the Court should consider whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused. And they say the Court should look at the particulars of each case, loss or inability to find or locate, get witnesses back, witnesses' memories faded on a contested point, whether there's any loss of evidence and things of that nature. And also what should obviously come under there would be pretrial preparation, not only by the Court, but the State, and whether or not that would involve getting witnesses in and out of court and things of that nature.

Defendant, through their brief – through his brief alleges that he has met the Slater factors, and he alleges that he should be allowed to withdraw his guilty plea because he didn't commit the offense to which he pled guilty. And he questions the questionable nature of his identification by

supposed eyewitnesses and the fact that the alleged weapon used was found several months after the incident, evidently, with no prints or no DNA on it.

He also indicates the prosecutor withheld evidence 'til the day before opening a photo of some guns and a photo where they tried to match the shell casings to the Glock 19, which match was inconclusive. And he also alleges a mock – I'm sorry – a model Glock 19 was found on 4/13/12, four months after the homicide, and the DNA flag was negative. So, he alleges it was not his weapon, and no print was on it.

He also alleges that on the night of the homicide, 12/24/11, the State's witnesses who called 9-1-1 told the dispatcher they didn't see anyone in the area or fleeing the scene. He alleges that Shawn Rice (phonetic) lied to the investigating officer about his name, and that he and his girlfriend wished to remain unknown. And he indicates witnesses signed off on defendant and co-defendant's mug shots, but in a tape recorded statement said they did not see their faces.

He also indicates that the crime was some 57 feet away from the witnesses' living room, and happened in the evening. Both witnesses claim that the suspects had on hoodie sweatshirts.

The State counters some of that by indicating that it's important to note that neither Rice nor Stanford (phonetic), who gave statements, ever actually observed the shooting. And they simply identified the defendants as their neighbor, somebody they knew from the neighborhood. And that this truck that the victim was in was seen in that neighborhood previously with Mr. Ross, and that they had seen both of them together evidently doing drug buys because evidently

that's what was going on at the time of this incident.

The – and also defense alleges the State's failure to bring in new evidence until the eve of trial before the opening was a violation of his rights under the 5th and 14th Amendment, and that the Court should have dismissed the case or granted a mistrial – which mistrial motion was never sought by the way – should have been declared due to prosecutorial misconduct.

And he indicates that he had no more than five or ten minutes to make a decision to plead guilty. That's absolutely not true. The jury in this case was picked all day on like a Monday, and then overnight we recessed, and then we were coming in the next day to do openings. And right before openings Mr. Wilson came to me with Ms. Gravitz and indicated – Mr. Wilson indicated he had been speaking with the defendant and they wished to change his plea and enter into a plea that would basically be an aggravated manslaughter plea, and that the murder charge of which he was charged would be amended to aggravated manslaughter with a cap of 30 years.

So, I don't know where he gets the fact that he only had five or ten minutes. He sat through jury selection, partook in jury selection. That was the whole day. Mr. Wilson was here that whole day. We adjourned for that day. Mr. Wilson came back, and then we were ready to pick – ready to open when he decided that he wanted to plea. Nobody put any pressure on him from the court or anywhere else about a plea, that's for sure.

The State says defendant has not provided any type of certification or affidavit as they're supposed to. They would indicate some type of plausible basis or colorable claim of innocence, and that his claims that

he makes in the form of his lawyer's brief is a bare assertion of innocence. And he has not presented a colorable claim in affidavit form with any information that could be checked out as to his innocence.

He also – the State also indicates that his argument regarding these pictures is a red herring in that the pictures were obtained early on in the investigation – and I think Mr. Wilson will acquiesce to this – and they were turned over to the defense in a disk a year prior. And as a result of a search warrant being issued to the co-defendant, Tanika Williams' (phonetic) cell phone and defendant, they were provided with this disk.

And that what the prosecutor gave to Mr. Wilson in anticipation having marked for trial was basically a blowup of those photographs that appeared on the disk. And I don't think Mr. Wilson disputes that. And therefore an argument that he didn't have that or it wasn't supplied or it was supplied at the eleventh hour is totally without merit because he – his assertion that he was baffled by this, under heavy stress at the time of the plea is actually belied by the Court. The Court has the transcript of his guilty plea.

Furthermore, he entered into what I consider to be a favorable, lenient plea – which I'll go into the reason in a moment – a favorable, lenient plea of what he was looking at. Furthermore, it's been two years since the crime. The State spent a lot of money preparing the case for trial, and the victim's family was heavily involved in the case.

In fact, the record should reflect that I refused, based on the defendant's constitutional right to a speedy trial, I refused to put the case off more than a few weeks to allow the defense – victim's family

to come up here after they were going to be in Florida for a long period of time. And I refused to put the case off two months for them to come back from Florida.

I basically said, much to the chagrin of the prosecutor, that I while I can understand the victim wanting to be here, while I can understand the victim's emotional attachment to the case, that the defendant was asserting a right to go to trial, speedy trial, wanted to go to trial, was ready to go to trial, and I scheduled the case right after the Christmas holiday, and scheduled it the first week of January.

As a result of that, the victim's family, at great expense, left the State of Florida, flew up to New Jersey for the trial. And in fact, my memory is absolutely completely clear that the day of the plea they were on their way up here, and the prosecutor wanted to hold off on finalizing the plea for an hour or two until they landed in Atlantic City and got here to the courthouse because they were coming up here to stay for the trial, that they were that much invested in it.

So, I pushed the case to January. The request, I believe, was to put the case off 'til March, which I denied the State's request in that regard because the defendant was entitled to what he wanted, which was a speedy trial, and he was going to get a speedy trial. We picked a jury, we were ready to have openings when he decided on his own to enter into a negotiated open-type plea with a cap attached to the top.

In any event, it would appear under the Slater criteria that his claim of innocence is a bald assertion if anything. It would appear there would be prejudice to the State if the motion is granted. The State had a huge witness list. I don't remember how many people, but it was over 20 people that

were subpoenaed. They were interviewed, they were subpoenaed to be in court.

As I said, the victim's family went through great expense to fly up here from Florida for the trial. And the issue about not seeing these pictures is absolutely not true. They were all on a disk. They were simply blown up for the time of trial. So, that argument is really one that is completely without merit.

Finally, there was a plea bargain entered into. It was a negotiated plea, and it was entered into freely and voluntarily. And it was entered into on January 7, 2014 before this Court. Defendant, as a part of that transcript, was asked things like, and you were here yesterday, the whole day, and you participated in jury selection? He answered yes. And you understand the jury is in the next room, they were right there in the next room and are ready to commence this trial? Yes. And you discussed all that with your lawyer? Yes.

And then he initialed and went over all the forms, that he was 31 years old. He also indicated – in the beginning of the colloquy I went over the terms of the plea, that the sentence was in the Court's discretion with a max of 30 years. And – and when I say lenient, favorable plea, the State took off the table the fact that he was extended-term eligible.

Extended-term eligible on a murder case means that if convicted, he would have been looking at a potential sentence of life in prison; that's 75 years. He entered into a plea for a max, cap of 30 years. So, the State taking off the possibility of an extended term, in my view, was rather huge.

I asked him on Page 3 if anybody forced him or threatened him to enter into the plea, if he was under the influence of any kind of

drug, if he understood that he had the right to continue the trial we started yesterday and put the State to their proofs, whether he understood the State had to prove all the charges beyond a reasonable doubt. He had the right to cross examine witnesses and testify if he wanted to, but he wouldn't have to, and if he didn't, nobody could say anything negatively about that to the jury, of which he answered yes to all of those questions.

He then went on to indicate at Page 5 he understood that this was an open plea to aggravated manslaughter, which means his sentence could be, in discretion of the Court, would be between 10 and 30 years in New Jersey State Prison under the No Early Release Act. He understood that.

Then I asked him, do you understand what the No Early Release Act is, he said, yes. And I said, it means you have to serve a certain percentage, what is that percentage, and correctly and quickly he answered yes, 85 percent, at Page 6 of the transcript. I also explained to him about the parole supervision after the sentence, and he answered those questions appropriately.

He said he discussed all of that with his lawyer. I asked him then if he recklessly caused the death of Steven Gerse (phonetic), yes. And then he went on to say that Mr. Gerse text him, asked me to buy some drugs. I told him he could. He came to the spot, where he came to the spot he tried to rip me off for the drugs. He jumped in his truck, and he tried to ride off, and I fired a single shot.

And he said he had a Glock 19, and he said he shot as he was driving away. And he also said, when we usually had hand transactions - he's saying he's had numerous prior drug transactions with the victim - I pass him the drugs, and he passes me the money. He

passed me the money, and he said police, and he hurried up, and when he sped off in his truck he almost ran me over.

And he was – said he was expecting $225 that he didn't get. He was supposed to hand me money, instead, he sped off. His truck almost ran me over. And I said, you admit that firing the shot then was reckless? Yes. And it was without regard for the value of human life knowing that what could happen, that he could get killed, and he said, yes. And he indicated he fired a single shot, and that the victim was hit.

He had the advice of competent counsel. We took all day almost to pick a jury. He participated in the jury selection. He decided with his lawyer to have discussions with the prosecutor overnight, the next morning, whatever. I was here with jurors ready to walk into the room when I was told that he wanted to enter into an open plea with a cap of 30, and the Court took the plea.

Nothing that he indicates in his moving papers under Slater factors in my view would come close to a colorable claim of a defense. It was a part of a plea bargain. The State went through much expense and time to get the witnesses. Not to say the time and the resources the Court took to bring in – it was about 95 to 100 jurors that day, and have the Court go through a very tedious jury selection process that the – the way that we have to pick juries now, tedious is probably the nicest word of that process that I could come up with. And all those things happened.

Mr. Ross, that was no dress rehearsal, that was the real thing. We were ready to try your case. You knowingly, voluntarily, with the advice of competent counsel chose to switch gears and enter into a guilty plea. If you were buying a car, I would call it

> buyer's remorse. That maybe you thought after you bought the car, I can't afford it. Well, you entered into that plea knowingly, voluntarily, and nothing you have said in your moving papers, in my view, would give you the right to withdraw that plea, and therefore your motion is denied.

ECF No. 5-5 at 2-8.

Petitioner argues that he was denied his constitutional right to trial when the trial court denied his motion to withdraw his guilty plea. See ECF No. 1 at 26. In essence, Petitioner asserts in Claim II the trial court misapplied the factors laid out by the New Jersey Supreme Court in State v. Slater, 966 A.2d 461 (N.J. 2009); namely:

1) whether he asserted a colorable claim of innocence;

2) the nature and strength of his reasons for withdrawal;

3) the existence of a plea bargain; and

4) whether the withdrawal would result in unfair prejudice to the state or unfair advantage to him.

Id. at 468.

To the extent that Petitioner is basing Claim II due to the trial court's purported error of state law, it is not cognizable in this § 2254 action. See Estelle, 502 U.S. at 67. Additionally, as courts have noted, '"[t]here is no Federal or Constitutional right to withdraw a guilty plea.'" Bishop v. New Jersey, No. 16-9178, 2018 WL 4198884, at 13 (D.N.J. Aug. 31, 2018) (quoting Roten v. Deloy, 575 F. Supp. 2d 597, 605 n.3 (D.

Del. 2008) (citing Hines v. Miller, 318 F.3d 157, 162 (2d Cir. 2003); Gov't of Virgin Islands v. Berry, 631 F.2d 214, 219 (3d Cir. 1980))). "A plea of guilty is a waiver of trial resulting in a conclusive conviction and does not deny the defendant a right to a jury trial." See id. (citing United States v. Colonna, 142 F.2d 210, 213 (3d Cir. 1944)).

The constitutional and cognizable element within Claim II though is whether Petitioner's plea was voluntary and intelligent. See North Carolina v. Alford, 400 U.S. 25, 31 (1970) (citations omitted). The voluntariness of a plea "can be determined only by considering all of the relevant circumstances surrounding it." Brady v. United States, 397 U.S. 742, 749 (1970) (citations omitted). In analyzing the voluntariness of a plea, the United States Supreme Court has explained that:

> the representations of the defendant, his lawyer, and the prosecutor as such a [plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); see also United States v. Stewart, 977 F.2d 81, 84 (3d Cir. 1992) ("The ritual of the [plea] colloquy is but a means toward determining

whether the plea was voluntary and knowing. A transcript showing full compliance with the customary inquiries and admonitions furnishes, strong, although not necessarily conclusive, evidence that the accused entered his plea without coercion and with an appreciation of its consequences."). "The determination of whether a guilty plea was "voluntary" for the purposes of the Constitution is a question of federal law, but the determination of the facts surrounding the plea itself are subject to AEDPA's highly deferential "clear and convincing" standard." See Bevins v. Wenerowicz, No. 11-2964, 2012 WL 3866895, at *4 (E.D. Pa. May 22, 2012), report and recommendation adopted, 2012 WL 3871507 (E.D. Pa. Sept. 6, 2012) (citing 28 U.S.C. § 2254(e)(1); Goggins v. Wilson, No. 07-1727, 2008 WL 343113, at *4 (E.D. Pa. Feb.5, 2008)).

The Superior Court meticulously and accurately reflected what transpired during the plea colloquy in ultimately denying Petitioner's motion to withdraw his guilty plea. In his habeas petition though, Petitioner states that he only accepted the plea after counsel informed him that he could not represent him. See ECF No. 1 at 26. However, this is belied by Petitioner's statement during the plea colloquy that nobody forced or threatened him to plead guilty. See ECF No. 5-4 at 3; see, e.g., Stuart v. Phelps, No. 09-250, 2011 WL 1302929, at *4 (D. Del. Apr. 1, 2011) ("[T]he statements Petitioner made during the

plea process belie his present allegations that counsel coerced him to plead guilty[.]"). Petitioner further admitted during the plea colloquy he discussed all his rights with his counsel and that understood them. See ECF No. 5-4 at 3-4.

Given this record, the Superior Court's ultimate conclusion that Petitioner's guilty plea was intelligent and voluntary was not an unreasonable application of clearly established federal law nor was the denial of Petitioner's motion to withdraw based on an unreasonable determination of the facts. Accordingly, Petitioner is not entitled to federal habeas relief on Claim II.

With respect to Claim I, Petitioner argues that he was denied the right to appeal because his appeal was placed on the Appellate Division's ESOA calendar. Petitioner was represented by counsel on appeal who argued that his thirty-year sentence was excessive. Additionally, Petitioner filed a pro se motion to have his appeal moved from the ESOA calendar to the plenary calendar because he also wanted to assert the Superior Court erred in denying his motion to withdraw his guilty plea.

Initially, this Court notes that there is not a constitutional right to hybrid representation. See United States v. D'Amario, 328 F. App'x 763, 764 (3d Cir. 2009) (citing McKaskle v. Wiggins, 465 U.S. 168, 183 (1984); see also United States v. Stenbrecher, 112 F. App'x 987, 988 (5th Cir. 2004) (noting no right to hybrid representation on appeal); Nelson v.

Lackner, No. 12-968 2013 WL 6178544, at *13 (E.D. Cal. Nov. 22, 2013) ("There is no federal constitutional right to self-representation on direct appeal, much less a right to hybrid representation that would require a court to permit a defendant to represent himself at the same time that he is represented by appellate counsel."). Thus, Petitioner did not have the constitutional right to file his own appellate brief as he did on direct appeal in this case. See Wallace v. Landry, No. 17-1790, 2019 WL 3860203, at *2 (M.D. La. Aug. 16, 2019) ("Because Petitioner was represented by counsel on appeal, Petitioner did not have a constitutional right to file his own appellate brief."). Accordingly, Petitioner's right to appeal was not prevented because he was represented by counsel on direct appeal who asserted his claims.

Petitioner's appellate counsel though may be deemed to have adopted Petitioner's pro se appellate motion by raising the issue during oral argument on appeal to the ESOA panel. See ECF No. 5-6 at 4-5. This request though was never decided by the Appellate Division. However, Petitioner appealed the failure of the Appellate Division to transfer his appeal to a plenary Appellate Division panel to the New Jersey Supreme Court in his petition for certification. See ECF No. 5-12. That court though denied Petitioner's petition for certification without discussion. See ECF No. 5-14. Thus, Petitioner was

permitted to and in fact did appeal the issue itself raised in Claim I.

Finally, and perhaps most importantly, the underlying issue that Petitioner wished to appeal was that the trial court erred in denying his motion to withdraw his guilty plea. As described above, that denial was not contrary to or an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts. Thus, any purported impropriety by the Appellate Division in failing to reach Petitioner's claim regarding the denial of his motion to withdrawal was harmless as failing to reach this issue by the Appellate Division did not have a substantial or injurious effect on Petitioner's appeal to the Appellate Division. See e.g., Eley v. Erickson, 712 F.3d 837 (3d Cir.2013) (citing Brecht v. Abrahamson, 507 U.S. 619, 637–38, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).

Accordingly, Claims I and II are both denied.

B. Claim III

In Claim III, Petitioner argues trial counsel was ineffective due to a lack of diligence. See ECF No. 1 at 28-29. More specifically, Petitioner notes several letters he sent to counsel which this Court interprets as Petitioner's complaints to counsel's performance for the reasons stated in the letters; more specifically:

1. Petitioner wrote trial counsel a letter postmarked November 9, 2012 requesting discovery materials and a probable cause hearing as well as inquiring into the status of his case and the reasoning behind the state's delays.

2. Petitioner wrote trial counsel on January 28, 2013 requesting that suppression motions be filed and that a Wade[3] hearing take place.

3. Petitioner requested an interlocutory appeal because he felt the Wade hearing decision was wrongly decided.

4. On January 14, 2014, Petitioner wrote to trial counsel requesting he get him a plea from 10-15 years imprisonment.

5. On January 27, 2014, Petitioner requested trial counsel file a motion to withdraw his guilty plea.

ECF No. 1 at 28-29.

Petitioner asserted these letters and the requests counsel failed to act on in those letters illustrate how counsel was ineffective in his PCR proceedings before the Superior Court. See ECF No. 5-18 at 9-12. That court determined Petitioner failed to show that counsel was ineffective or that Petitioner was prejudiced under Strickland v. Washington, 466 U.S. 668 (1984). See ECF 5-19 at 6-8. On appeal, Petitioner argued the PCR Court erred in denying an evidentiary hearing. Petitioner, through counsel, set forth his sole claim on appeal as follows:

> The [PCR] court denied defendant's allegations of ineffective assistance of counsels set forth in his petition for post-

[3] A Wade hearing is held to determine the admissibility of identification testimony. See Manson v. Brathwaite, 432 U.S. 98, 114 (1977); United States v. Wade, 388 U.S. 218, 219-20 (1967) (vacating conviction pending a hearing to determine whether the in-court identifications had an independent source).

> conviction relief, characterizing them as "bald assertions and lack[ing] merit." However, defendant alleged with specificity trial counsel's actions that he believed deprived him of effective assistance of counsel. Defendant asserted that he had always intended to proceed to trial and counsel encouraged him throughout their year-long attorney-client relationship to do so. But suddenly, on the day of opening statements, counsel changed his mind without offering defendant much of an explanation other than that he had overlooked some of the State's evidence and decided that defendant must negotiate a plea agreement. Defendant asserted that counsel also misadvised him that the court would impose a 15-year sentence on the open plea to aggravated manslaughter even though the exposure was greater. Because these allegations established a prima facie case of ineffective assistance of counsel, the court's denial of defendant's post-conviction relief without even an evidentiary hearing to determine the effectiveness of counsel's representation was error.

ECF No. 5-22 at 21-22. Petitioner did not include the letters outlined above that he attached to his PCR petition in the Superior Court to the Appellate Division on appeal.

Given these circumstances, Petitioner's arguments within Claim III may be considered unexhausted since they were not raised on appeal of the denial of Petitioner's PCR petition. Nevertheless, for the foregoing reasons, even applying a more lenient "colorable" standard rather than AEDPA's deferential standard, this Court will deny Claim III on the merits.

The Sixth Amendment guarantees effective assistance of counsel. In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court articulated the two-prong test for demonstrating when counsel is deemed ineffective. First, the petitioner must show that considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. See id. at 688; see also Grant v. Lockett, 709 F.3d 224, 232 (3d Cir. 2013) (noting that it is necessary to analyze an ineffectiveness claim considering all circumstances) (citation omitted). A petitioner must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. See Strickland, 466 U.S. at 690. Under this first prong of the Strickland test, scrutiny of counsel's conduct must be "highly deferential." See id. at 689. Indeed, "[c]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690.

The reviewing court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. If counsel makes "a thorough investigation of law and facts" about his plausible options, the strategic choices he makes accordingly are "virtually unchallengeable." Gov't of

Virgin Islands v. Weatherwax, 77 F.3d 1425, 1432 (3d Cir. 2006) (citing Strickland, 466 U.S. at 690-91). If, on the other hand, counsel pursues a certain strategy after a less than complete investigation, his choices are considered reasonable "to the extent that reasonable professional judgments support the limitations on investigation." Rolan v. Vaughn, 445 F.3d 671, 682 (3d Cir. 2006) (citing Strickland, 466 U.S. at 690-91).

The second prong of the Strickland test requires the petitioner to affirmatively prove prejudice. See 466 U.S at 693. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.; see also McBridge v. Superintendent, SCI Houtzdale, 687 F.3d 92, 102 n.11 (3d Cir. 2012). "This does not require that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 111-12 (2011) (internal quotation marks and citations omitted).

"With respect to the sequence of the two prongs, the Strickland Court held that 'a court need not determine whether

counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.'" Rainey v. Varner, 603 F.3d 189, 201 (3d Cir. 2010) (quoting Strickland, 466 U.S. at 697).

With respect to Petitioner's November 9, 2012 requests, including for discovery materials and a probable cause hearing, Petitioner does not show with any specificity how counsel's actions or inactions prejudiced him. Any purported ineffectiveness arising from this letter is bald and conclusory which is insufficient to entitle Petitioner to federal habeas relief. Jesus-Concepcion v. United States, No. 17-12152 (MCA), 2019 WL 4127364, at *3 (D.N.J. Aug. 30, 2019) (citing Palmer v. Hendricks, 592 F.3d 386, 395 (3d Cir. 2010)) ("[B]ald assertions and conclusory allegations" are insufficient to establish an ineffective assistance of counsel claim.).

Next, given that a Wade hearing did take place, this Court finds counsel was not ineffective for failing to respond to Petitioner's January 28, 2013 letter requesting one. Nevertheless, Petitioner also asserts counsel should have filed an interlocutory appeal because the trial court's Wade hearing decision was incorrect. Thus, this Court will analyze whether

such an appeal would have been successful to a reasonable probability in analyzing this claim under Strickland's prejudice standard.

An out-of-court identification may implicate due-process concerns when "law enforcement officers use[d] an identification procedure that is both suggestive and unnecessary." Manson v. Brathwaite, 432 U.S. 98, 107 (1977); see also Neil v. Biggers, 409 U.S. 188, 198 (1972). An identification procedure may be deemed unduly and unnecessarily suggestive if it is based on police procedures that create "a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968); see also Biggers, 409 U.S. at 197. The United States Supreme Court has explained that, when the police use suggestive procedures, "the witness thereafter is apt to retain in his memory the image of the [misidentification] rather than that of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." Simmons, 390 U.S. at 383–84.

Nevertheless, it is insufficient to generally show that the identification "may have in some respects fallen short of the ideal." Id. at 385. Instead, "[i]t is the likelihood of misidentification which violates a defendant's right to due process." Biggers, 409 U.S. at 198. As the Supreme Court explained,

> An identification infected by improper police influence ... is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.

Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (internal quotation marks and citation omitted).

The Supreme Court has thus held that, even if improper procedures have rendered an identification unnecessarily suggestive, the admission of the suggestive identification does not violate due process so long as the identification possesses sufficient aspects of reliability, as reliability is the "linchpin in determining the admissibility of identification testimony." Brathwaite, 432 U.S. at 106, 114; see also United States v. Wise, 515 F.3d 207, 215 (3d Cir. 2008). The central question in determining whether an improper identification may be admitted is "'whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.'" Brathwaite, 432 U.S. at 106 (quoting Biggers, 409 U.S. at 199); see also United States v. Maloney, 513 F.3d 350, 355 (3d Cir. 2008).

In answering this question, a court should conduct a case-specific analysis, considering the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Biggers, 409 U.S. at 199-200; see also Simmons, 390 U.S. at 384. In Simmons v. United States, in which the Supreme Court addressed the constitutional infirmities arising from unduly suggestive photographic arrays, the Court held "that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons, 390 U.S. at 384. This has been generally interpreted as a condemnation of "the use of photo arrays in which the suspect's photograph 'is in some way emphasized.'" Darden v. Wainwright, 477 U.S. 168, 199 (1986) (quoting Simmons, 390 U.S. at 383).

To determine whether Petitioner has stated a "colorable" ineffective assistance of counsel claim, this Court will consider the propriety of the Superior Court's denial of Petitioner's suppression motion. The Superior Court heard

testimony from Sergeant Mattioli, an investigating officer, during the suppression hearing. No other witnesses were called by either side. This officer testified that Rice was able to identify the individual (Petitioner) at the crime scene immediately after the shooting because he recognized him as his neighbor. See ECF No. 5-3 at 14-17. Mattioli testified that a photo array was not needed with Rice because he already knew him. See id. at 19.

Similarly, Mattioli testified that Stanford was familiar with the person (Petitioner) she saw outside after the shooting occurred as he was one of her neighbors and that she also recognized his truck. See id. at 27-28. Like Rice, a photo array was not used to have Stanford identify Petitioner because she said she knew the person she saw. See id. at 28.

The trial court denied the suppression motion by Petitioner in a lengthy decision from the bench. More specifically, the trial judge stated as follows:

> Mattioli has been here today and he – and he's testified. I found him to be credible . . . . I found him to be credible and somebody that's been doing this for a number of years . . . . I'm looking at the date, 1/13/12, when the two interviews were conducted of Rice and Stanford, so that was about, you know, 13, almost three weeks after the – after the shootings. And that indicated he had discussions with them off tape to get a feel for their amenability to give a statement and to ask them what they saw, what they knew, etc., before the tape

would go on. He indicated that – Mr. Rice indicated that he was not initially totally candid on the date of the incident because he was somewhat reluctant. When the tape went on the interview, he was then asked to confirm things that were discussed off of the tape. He indicated that he talked to Rice for about an hour before he put the tape on and that he basically went over what Rice saw, what he heard, what he did and what he said on the night of the offence.

Rice gave a description that was of Mr. Ross. He indicated that initially his reaction was drawn to the area when he heard a gunshot and a crash. He looked out the window and he recognized who he said was Mr. Ross, saw him near the truck. He said that Mr. Ross was his neighbor, lived in the same complex a short distance away and he knew him.

And that was the key thing that Mattioli relied upon, is that I wasn't talking about somebody or I had to show him a six-pack of photographs because he knew this person, because he lived near him and he has seen him. Even though he didn't know his name, he knows him from being a neighbor and he indicated he saw him more than 20 times previously. And that was the reason he indicated there was no photo array.
He also indicated that he saw a female go to the crash area and look around and he also knew her and he identified her as Tenika (sic) Williams. He indicated that he knew her and he was shown the photo and then he positively ID'd her.

Rice indicated again on tape everything I indicated. He knew the two people that were identified; they were neighbors. He then ID'd them from the one photo that was shown. He knew about them, but didn't know their name. . . .

And then so basically what Mattioli said was that he did not follow the Attorney General Guidelines, nor did he show them a six-pack or anything like a lineup or anything like that because these people articulated to him that they knew who these people were, although not by name, but by sight form living in the area and seeing them on a regular ongoing basis. They indicated they saw the defendant go up to that truck many times before. He said he was hundred percent sure that it was him, Rice said, 'cause he had seen him more than 20 times.

In the case of – in the case of Miss Stanford, when she identified Miss Williams, she indicated that while she didn't see her face, that she knew her from build. And she also indicated, which I think is of paramount importance, she said she went to school with her. So you go to school with somebody, you see them, you know, more than once or twice and, you know, you know who they are, what they look like. So that was – that to me was actually the most compelling part of the statement. It really wasn't emphasized, but to me it was the most compelling part where she said she went to school with her.

She said that she did not see the faces of either of the defendants, but that she knew that the male, Mr. Ross, from the hoodie that he always wore when he sat out on the port, it was the same hoodie, and he knew – and that they – she knew her, Miss Williams, from her build and from her being with the defendant, who were allegedly a couple.

Cross-examination took place about the Attorney General Guidelines and the – and the like. Under the Henderson case, quite frankly, I probably could've stopped the hearing at some point 'cause under that case, it indicates that if you grant a hearing, that if and when the point comes that the Court is satisfied that the

identification procedure was not impermissibly suggestive, that the judge could stop the hearing midstream. I chose not to do that for purposes of completeness of the record and the like and I let the hearing go on.

But, quite frankly, the main issue was what happened off tape and whether or not anything happened off tape or whether it was suggested in any way, shape or form that these were the people who were identified that were involved in the incident.

Under Henderson, we now have the Supreme Court case, heh, decided and the opinion written by Chief Justice Rabner that, quite frankly, makes these identification matters much more complete and provides many more variables that could be addressed, especially by defense counsel, in determining whether or not the overall identification, A, is reliable under a totality of circumstances and, B, whether the identification in and of itself was a result of impermissibly suggestive procedures that would make the identification be suspect.

First to obtain a pretrial hearing, defendant has to show the initial burden of evidence of suggestiveness. As I said, I really couldn't say when I ordered the hearing because I didn't know what happened off cam – off. So I chose to error (sic) on the side of caution and say we have to have a hearing 'cause I don't know if there was an issue of suggestiveness because I don't know what happened. I ordered the hearing.

Second, the State then has to come forward with proof under Henderson to show that the proper eyewitness identification is reliable. That's what this is all about, reliability. And you must account for system and estimator variables. It goes without saying that the estimator variables

come into play much more importantly and more prevalent at the time of any trial when the people who made the identification are present in court.

But as far as the system variables, how it was done, how it was conducted, where it was conducted, the circumstances under which it was conducted, was there a lineup, was there a show-up, was there a six-pack, they – they're all the system variables and they had to be analyzed to show whether or not there was an issue of suggestiveness.

And third, the bottom line is, is that after you go through these exercises, the burden is still on the defendant to show not that there may have been irreparable mi[s]identification, but under the law, the case law, a very substantial likelihood of irreparable misidentification. It's a pretty high burden if you look at the literal meaning of those words. You know, not, oh, well, maybe there was a mi[s]identification. That's not the standard. The standard is whether or not there was a very substantial likelihood of irreparable mi[s]identification.

And then finally the fourth analysis or the fourth prong is that after hearing all of the evidence and weighing all of the evidence, the Court must decide from a totality of the circumstances whether or not the defendant has carried their burden to show a very substantial likelihood of mi[s]identification. If so, the Court should suppress the identification. If not, then appropriate tailored jury instructions should be prepared and given to the trier-of-fact.

On these system variables, there's things that have to be considered, such as blind administration, was a lineup procedure performed double-blind, etc. Was there an envelope method, preidentification

instructions. Whether or not the administrator provided neutral preidentification instructions or warning the suspect may not be present and should not feel compelled to make an identification. That was not done in this case, admittedly so. But whether or not that is fatal, I will go into.

If there was a lineup construction, which there was not here, whether the array only had one suspect or five innocent fillers, which did not occur here, either. There was one picture shown. Feedback, whether the witness received any information or feedback about the suspect. Recording confidence, whether or not the witness's statement of confidence immediately after the identification. In this case, the male indicated he was hundred precent certain of the identification. Multiple viewing, show-ups, private actors and other identifications that were made. Those are all the things that would go into the system variables.

As far as the estimator variables, stress, weapon, focus, duration, how much time did the witness have to observe, distance and lighting, whether that was a distraction. Witness characteristics, whether the witness was under the influence of drugs, things of that nature. Characteristics of the perpetrator, was he wearing a disguise. In this case, a great mention was made of the fact that the defendant Ross was wearing a hoodie that he always wore and that he was - and that the person who did the identification was familiar with while Ross sat on his porch during winter cold nights. So that was a - obviously a characteristic of the perpetrator.

Memory decay, race bias, opportunity to view at the time of the crime, degree of attention, accuracy of prior description, level of certainty demonstrated and the time

lapse between the crime and the confrontation. All of those things go into the equation.

Quite frankly, this is a little bit of a unique situation in that the off-cam – off-tape discussions that took place were not really very long in conjunction with what happened and what was seen. And it was be – and it wasn't, you know, where they were trying to pull a needle from a haystack where there was no familiarity with the person being identified, where, you know, somebody says, yeah, I saw this occur, it happened bim-boom-boom, you know, I never saw – got a good look at the person, I never saw the person before.

You know, here you have what is tantamount to somebody coming into court here, or anybody, it could be anybody, and saying, here, I looked outside and I heard a shot and I saw my neighbor, who I see every day, and he had the same clothing on that he wears every day, you know, when it's cold and I saw him, you know, next to this car and a guy in it was shot. And then I saw the girl that's always with him and I see them every day and I saw her on her hands and knees looking for something and then the – heard a police car and they took off and they went and that, you know, and that I know it was them. I'm a hundred precent sure because I know them, I see them, they're my neighbors. So it's a unique situation.

But it adds to the identification and it adds to the factors to be considered under the system of variables of whether or not the identification is reliable and whether or not the – it is – whether or not there's a likelihood that the identification could be fraud.

Therefore, under the totality of the circumstances, it would seem that the, as I

said, the witnesses knew the suspects, were familiar with the truck in question, were familiar with them and lived next to them, have seen them on numerous occasions and in the – and in the event of the female, Stafford (sic) said she went to school with Miss Williams. You can't get much more than that.

Familiar with the clothing worn by Mr. Ross. Observed them from immediately after the incident occurred. Within seconds, looked out and saw them at the "crime scene." No, they did not see somebody pull the gun. They did not see who had a gun in their hand. They did not see the shot fired. But within seconds, they looked outside and came upon and looked, and looked at what was a "crime scene" where there were people still on the scene.

No question it was dark out. It appears that – even though it didn't – wasn't gone into very much, the testimony – it would appear that the angle and distance of the view from the window of the apartment to the street was one without major hinderance or obstruction.

Again, the male suspect was wearing this hoodie attributable to him. And they – the identifications were made about three weeks after the shooting. And in the grand scheme of things when you look at identifications that take place, that's not a long period of time as far as for memories to fade or to forget things. Most identification procedures are after months and months of police investigation. So I find that those three weeks is of no real – really of no moment to the overall analysis.

The Court went on to say in Henderson that the A.G. Guidelines provided practices for photo lineups and whether a minimum number of five filler or non-suspects should be shown to the witness at one time. And the

> Henderson case made reference to failure to comply with those guidelines and said that the Attorney General noted that the identifications that do not follow the recommended guidelines should not be deemed inadmissible or otherwise in error.
>
> Although the State argued that the Court should defer to other branches of government to deal with the evolving social or scientific landscape, it's the Court's obligation to guarantee that Constitutional requirements are met and to ensure the integrity of criminal trials. The Court went on to say that that would not be fatal and that obviously you have to look at a totality of the circumstances of the --- of the identification.
>
> The goal is reliability, obviously. And the goal is to show that there's no misidentification. And, quite frankly, there's probably very, very few identifications that could possibly take place would appear to be on their face more reliable than somebody identifying their next-door neighbor, identifying somebody that they live next to and see on numerous, numerous occasions.
>
> And for those reason [sic] and all the reasons previously articulated, the defendant in my view does not come close to establishing an irreparable miscon – misidentification to show that in any way, shape or form that the -- that there was a substantial likelihood of it. I think that, you know, the circumstances of the identification and the particulars of it will be brought out at the time of any trial in this case, but the defense has fallen short of proving that. And, therefore, the motion to suppress the statements would be denied.

ECF No. 5-3 at 117-29.

In this case, as outlined above, the trial court screened the identifications for their reliability pre-trial. The trial court determined both identifications possessed sufficient aspects of reliability. That court analyzed the identifications applying the totality of the circumstances and properly held that there was no substantial likelihood of irreparable misidentification. This Court finds no reason to disturb those findings. Accordingly, Petitioner fails to show that counsel was ineffective by not filing an interlocutory appeal on a meritless issue and also fails to show that he was prejudiced by counsel not filing an appeal as he does not show to a reasonable probability that the outcome of his appeal would have been successful. See Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000) ("[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim.") (citation omitted); United States v. Jackson, No. 09-5255, 2010 WL 1688543, at *8 (E.D. Pa. Apr. 27, 2010) (citing United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999)) ("Under Strickland, Jackson's appellate counsel cannot be ineffective for failing to raise a meritless issue on appeal.").

Next, Petitioner alludes to a January 20, 2014 letter – sent to counsel after his guilty plea, but before sentencing, in which he requested counsel get him a plea "within the range of 10 to 15 years." See ECF No. 1 at 29. During the plea

colloquy, Petitioner testified that he understood with his open plea that he faced between ten to thirty years imprisonment. That Petitioner was ultimately sentenced to the high end of that range and that counsel was not able to secure a sentence that Petitioner would have preferred does not amount to ineffectiveness on the part of trial counsel.

Finally, Petitioner is not entitled to federal habeas relief related to his January 27, 2014 letter to counsel requesting he file a motion to withdraw his guilty plea. Indeed, counsel in fact filed a request to withdraw Petitioner's guilty plea. Thus, counsel was not ineffective as he followed Petitioner's wishes in filing the motion.

Accordingly, Petitioner is not entitled to habeas relief on any of his arguments within Claim III.

C. Claim IV

Petitioner asserts in Claim IV that trial counsel failed to investigate and present a trial strategy which compelled Petitioner to plead guilty. More specifically, Petitioner takes exception to the credibility of Rice and Stanford's statements and identifications to police. Petitioner claims the fact their identifications were made three weeks after the crimes and that Petitioner was not even charged until six months after their identifications establishes the questionability of their identifications.

Petitioner fails to show that he is entitled to federal habeas relief on this claim. Indeed, the reliability and credibility of the two witnesses was correctly analyzed in depth during the pretrial suppression hearing. Claim IV will therefore be denied.

D. Claim V

In Claim V, Petitioner claims counsel was ineffective because he failed to obtain an affidavit from Rice that would have supported Petitioner's actual innocence argument at his plea withdrawal hearing.

This Court construes this claim as one of trial counsel's purported failure to investigate. More specifically, trial counsel purportedly failed to investigate and get an affidavit from Rice to support Petitioner's actual innocence theory at his plea withdrawal hearing.

In Duncan v. Morton, 256 F.3d 189, 202 (3d Cir. 2001), the Third Circuit found that a habeas petitioner's failure to present sworn testimony by the witnesses the habeas petitioner claimed counsel should have investigated and called as a witness amounted to a failure to establish Strickland prejudice. See id. ("In light of Duncan's failure to present any sworn testimony *by Sherman*, he has failed to establish prejudice as a result of [counsel's] failure to interview Sherman.") (emphasis added). Here, Petitioner fails to provide a sworn statement

from Rice regarding what his testimony would have been had counsel asked him for an affidavit or had him testify at Petitioner's plea withdrawal hearing.

It is worth noting though that in his PCR proceedings, Petitioner submitted a notarized statement from Rice dated October 25, 2013, in which Rice stated as follows:

> I told a lie about witnessing Lenny Ross Jr. shooting a man in Pleasantville N.J. I was scared that the Detective's were going to arrest me on my outstanding warrants and I just said whatever to keep them from arresting me and putting me in jail. I was under the influence of drugs and alcohol at the time. I'm writing this on my own free will.

ECF No. 5-18 at 82. First, Rice's statement did not comply with New Jersey's rules for affidavits because it was not a sworn statement or certified in lieu of an oath. See N.J. Ct. R. 1:4-4 ("In lieu of the affidavit, oath or verification required by these rules, the affiant may submit the following certification which shall be dated and immediately precede the affiant's signature: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.").

Second, as noted in Duncan, to obtain federal habeas relief on a failure to investigate claim, Petitioner needed to come forward with an affidavit from Rice, something he still has failed to do in these federal habeas proceedings. Accordingly,

Petitioner fails to show to a reasonable probability that the outcome of his proceedings would have been different had trial counsel made further investigation as it relates to a possible Rice affidavit.

Within Claim V, Petitioner also claims trial counsel was ineffective because he failed to submit an affidavit from Petitioner to support his actual innocence claim to support his withdrawal of guilty plea request. However, Petitioner fails to show to a reasonable probability that the outcome would have been different had he provided an affidavit from himself at his plea withdrawal hearing to support an actual innocence argument. The underlying case against Petitioner included two eyewitnesses which placed Petitioner at the crime scene immediately after it occurred. The case against him was strong and this Court fails to see how a self-serving affidavit from Petitioner during his plea withdraw hearing would have changed the result to a reasonable probability. Thus, Petitioner is not entitled to federal habeas relief on either of his arguments within Claim V.

E. Claim VI

Petitioner makes three ineffective assistance of counsel arguments within Claim VI. Each are considered in turn.

First, Petitioner claims that appellate counsel was ineffective by failing to argue Petitioner's motion that his appeal be removed from the ESOA calendar and assigned to the

plenary calendar. Contrary to Petitioner's claim, as detailed supra, counsel did request on appeal during oral argument per Petitioner's wishes that the matter be removed from the ESOA calendar to the plenary calendar. Thus, counsel cannot be deemed ineffective based on this argument as he did what Petitioner asked him to do.

Next, Plaintiff asserts counsel was ineffective on appeal because counsel did not appeal the denial of Petitioner's motion to withdrawal his guilty plea. Petitioner though fails to show any prejudice under Strickland with respect to this argument. Indeed, as described supra, Petitioner failed to show that he was entitled to withdrawal his guilty plea.

Finally, Petitioner asserts counsel was ineffective on appeal because counsel did not appeal the denial of his pretrial suppression motion. As described supra, the trial court properly denied Petitioner's motion to suppress Rice and Stanford's identifications. Thus, Petitioner's counsel was not ineffective on appeal for not raising a meritless issue. See Werts, 228 F.3d at 203. Therefore, Petitioner is not entitled to federal habeas relief on any of his arguments within Claim VI.

F. Claim VII

In Claim VII, Petitioner asserts that PCR counsel was ineffective for failing to interview Rice, Aaron Chandler and

Petitioner's trial counsel. Petitioner is not entitled to federal habeas relief on this claim. Indeed, 28 U.S.C. § 2254(i) precludes claims for ineffective assistance of PCR counsel. See, e.g., Martinez v. Ryan, 566 U.S. 1, 18 (2012) (while ineffective assistance on initial collateral review proceedings may be grounds for excusing procedural default, it is not the basis for an independent constitutional claim). Accordingly, Claim VII is denied.

V. CERTIFICATE OF APPEALABILTY

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Petitioner is not entitled to a certificate of appealability on any of his claims applying this standard.

VI. CONCLUSION

For the foregoing reasons, Petitioner's habeas petition will be denied and a certificate of appealability shall not issue. An appropriate order will be entered.

Dated: June 2, 2022
At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.